

RESTRICTIONS ON FOREIGN INVESTMENT: DEVELOPMENTS IN EUROPEAN LAW

André Bruyneel^{*}

MR. HAWES: Now, we would like to hear where Europe--if one may unitize the term in this fashion (and I am sure one may not)--where Europe fits on the spectrum of neutrality or antagonism or welcoming of foreign investment.

1. INTRODUCTION

MR. BRUYNEEL: It is rather awkward, for various reasons, to treat this topic. First, under the label "European Law" are included not only international and EEC regulations but also about twenty national legal systems from Iceland to Turkey--even after leaving out East European countries. The documentation we have collected--though, of course, incomplete--stands three feet high, while only twenty minutes have been provided for my address.

Second, the topic is but partly a matter of law; for example, authors rarely comment on the administrative remedies available against a decision to refuse an authorization. Basically, the rules depend on economic policy. Moreover, the sources of the law are relatively difficult to use. These are either statutory provisions--frequently complicated and poorly drafted--that are far from the actual administrative practice [1], or they are descriptions, such as the OECD documents, prepared on the basis of inquiries made exclusively to national administrations [2].

Third, numerous factors that are unrelated to the usual notion of restrictions on foreign investment influence a decision to invest abroad. Some of these factors may have a significant restrictive effect, for example, tax treatment of branches, antitrust law [3], possible obligation to launch a public offer after acquiring control of a company [4], intensity of labor involvement in takeovers and mergers [5], and similar considerations. Thus, it is essential not to go astray, despite the appeal of such side issues.

The final difficulty is that the topic seems somewhat paradoxical in a period when the general trend in Europe is characterized by some withdrawal of foreign branches and subsidiaries. Because of this curtailment and, more particularly, in order to

^{*}It is my privilege to thank Mr. Marc Kadaner, member of the Brussels Bar and teaching fellow at Brussels University, for his helpful assistance in collecting a major part of the documentation. I also would like to thank the numerous persons (professors, attorneys, civil servants, central bank or bank officials, etc.) who kindly agreed to answer my questions on their respective national laws and administrative practices.

stabilize employment, there is serious competition for systematically attracting and retaining foreign investment--not for setting up new restrictions [6]. Rather low stock price quotations (which can stimulate takeovers under good financial conditions), together with massive public grants and various other factors, explain the persistence of an important though reduced flow of foreign investment in Europe [7].

I shall try to meet the challenge of my topic, however, by immediately making clear three limits on my discussion. I shall consider only (1) significant and direct restrictions on foreign direct investment--thus investments abroad and portfolio investments will be excluded; (2) general rules--thus restrictions specific to any particular economic sector, with the exception of banking, will be disregarded; (3) the most prevalent restrictions--because it would be difficult and tedious to describe the regulations existing in about twenty different countries. I shall endeavor to sketch, on the basis of some examples, the main types of investment restrictions before trying to evaluate their development and effectiveness. Prior examination of some international and EEC aspects will be necessary.

2. INTERNATIONAL AND EEC INFLUENCES

EEC law must, of course, be given precedence. However, it is useful first to have a look at certain rules established by the OECD to create a more traditional--and less explicit--framework for international cooperation.

A. OECD Rules

Since 1961, the Member States (except Canada) have adopted the OECD Code of Liberalization of Capital Movements [8]. According to articles 1 and 2, the contracting parties commit themselves to automatic authorization of transactions related to direct investments in or from other OECD countries (these transactions are included in OECD lists A/I/A and B). This rule of liberalization allows Member States to declare reservations or national abrogations, although these are rare as regards foreign direct investment. Here we find the justification for a periodic examination and review of the current situation by the Committee of Invisible Transactions and Capital Movements. National practices have consequently become more open to public view, and they are the bases of an interesting documentation kept up-to-date and published by the OECD [9].

In addition to the Code on Capital Movements, the Declaration on International Investment and Multinational Enterprises was issued by the governments of OECD Member States on June 21, 1976 [10]. The principal contents of the Declaration are (1) a recommendation that multinational enterprises observe the Guidelines for Multinational Enterprises [11]; (2) a rather general statement on international investment incentives and disincentives, together with a consultation procedure (which is never applied) in case of difficulties; and (3) an endorsement of the principle of national treatment, to be granted to foreign-controlled enterprises by each Member State.

Information concerning the application of this last principle --in fields like taxation, governmental grants, access to bank credits and financial markets, procurement contracts, and manufacturing licenses--has been periodically published [12] and illustrates the

not infrequent reluctance of national authorities to answer OECD inquiries with clarity and completeness.

B. EEC Law

With the law of the European Communities, we enter a field with much greater constraints on the national governments. Article 3(c) of the EEC Treaty provides for "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital," and this general principle is implemented in title III of the Treaty. The free movement of goods is, of course, the fourth fundamental EEC freedom [13]. I shall now comment only on "freedom of establishment" and on "freedom of capital movements." [14]

(i) Freedom of establishment

(In fact, this means equal treatment, rather than a blanket right of establishment.)

According to article 52, paragraph 1, "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period." The restraints to be abolished include "restrictions on the setting up of agencies, branches or subsidiaries" and restrictions on the right "to set up and manage undertakings, in particular companies or firms." [15]

Article 52 was completed by the standstill clause of article 53, which prohibited the imposition of new restrictions, and by the very important article 54, which established procedures and time limits for the abolition of existing restrictions, assigned special duties to the Council and the Commission [16], and authorized co-ordination provisions [17].

According to the case law of the European Court of Justice [18], the articles of the Treaty concerning all the freedoms--except free movement of capital--are directly applicable to Member States since the end of the transitional period: January 1, 1970. This means that all restrictions are automatically abolished without need for further directives. Furthermore, these articles of the Treaty have created rights that may be enforced in court by individuals or companies against Member States, other individuals, or corporations [19] [20].

Except for capital-movement problems, hereafter discussed, more restrictions on foreign investments among EEC countries have been abolished as a result of application of the right of establishment or of the Commission's pressure.

One Belgian example is worth noting. In order to protect Belgian enterprises against foreign takeovers in conflict with national policy, the Act on Stock Exchanges was modified in 1967 to require an authorization by the Minister of Finance in any case of a public takeover bid launched by or on behalf of foreigners or Belgian companies under direct or indirect foreign control [21]. On the basis of the right of establishment and the standstill clause, the EEC Commission soon required the abolition of this new provision [22]. The Commission, clearly intending to make an example, rejected all defenses presented by the Belgian government [23] and threatened to bring the case before the Court of Justice in Luxembourg [24].

Finally, the law was changed in 1972, and the authorization system was restricted to public takeover bids launched by non-EEC foreigners [25]. After 1972--and before then as well--cases of refusal of authorization were extremely rare [26] [27] [28]. Today, the Commission is still active in its role of watchdog for the freedom of establishment. For example, it takes action against Member States when it discovers bylaws of important industrial companies or banks that prevent foreigners from becoming shareholders.

(ii) *Free movement of capital*

The unrestricted movement of capital involves a difficult freedom. It is very closely linked to internal financial markets and to their control--thus implicating economic policies that the Treaty has basically left to the Member States. Articles 104 to 109 on the balance of payments [29] illustrate the necessary equilibrium between the free movement of capital and the needs of national economic policies. These provisions, together with articles 67 to 73 on the free movement of capital [30], have created a situation which is complex and not uniform in all Member States.

According to article 106, paragraph 1, "each Member State undertakes to authorize any payments connected with the movement of goods, services or capital, and any transfers of capital . . . to the extent that the movement of goods, services, capital and persons between Member States has been liberalized pursuant to this Treaty." [emphasis added]. Article 106 has thus automatically freed nearly all current payments connected with the basic freedoms: the movement of goods, workers, and services; and the right of establishment.

The situation is different for capital movements because article 67 is not directly binding on Member States [31]. However, two directives of 1960 and 1962 [32] have eased restrictions on many foreign exchange transactions, but to an extent that differs according to four categories of transactions. For the first category (list A of Annex I), transactions between EEC residents are unconditionally freed; and the transactions of list A include direct investments and real estate investments. [33]

Unfortunately for the principle of free movement and for list A, in the Treaty there are also three safeguard clauses. Article 108 provides for Community response to difficulties in one Member State as regards balance of payments; article 109 allows national action in case of a sudden crisis in the balance of payments; and article 73 deals with disturbances in the functioning of the capital market.

The EEC achievements in the field of capital movements can hardly be considered satisfactory. The situation differs from one Member State to another, because list C includes only certain countries and because of the use of safeguard clauses in favor of France, the U.K., Ireland, Denmark, and Italy [34]. Even for liberated transactions, nothing has been done to reduce formalities, paperwork, and stamps [35]. And, finally, the Commission did not succeed with its 1964 proposal for a third directive in the field of capital movements [36].

At this moment, I should like to tell you an interesting French story that demonstrates perfectly the vicious interaction that is possible between exchange control objectives and the regulation of foreign direct investments.

In 1967, exchange control was abolished in France, but at the same time a system for controlling foreign investments was set up.

Prior notification was required and the Minister of the Economy retained a right of refusal (*droit d'ajournement*) for two months after notification [37]. Then, for political reasons, France was obliged to reinstitute exchange controls, first in May 1968 and then on November 24, 1968. These measures were a *posteriori* legalized at the EEC level--on the basis of the article 108 safeguard clause [38] --and they still remain in force.

However, the EEC Commission refused to accept the *droit d'ajournement* as far as control of foreign direct investment was concerned. An action was initiated in 1969 against France, for (obvious, in my opinion) violation of article 52 freedom of establishment [39]. Finally, in 1971, the French government agreed to cancel the *droit d'ajournement*; but, at the same time the exchange control regulations were completed by the addition of an authorization procedure for foreign direct investments [40].

As you can imagine, this authorization procedure was not infrequently used for purposes other than exchange control. There were a number of cases of denial or failure to answer--which takes longer for the applicant but has the legal effect of a refusal. Some of these cases are well-known (like the Ferodo case) and have created new difficulties between Paris and Brussels: in effect, this authorization system, as applied, was contrary to the right of establishment and was also a misuse of the exceptional safeguard measures granted to France in 1968 in the field of exchange control only.

The (perhaps temporary) end of the story came with the very important Decree of August 4, 1980 [41], which has replaced--but only for direct investments inside the EEC--the authorization system by a mere notification that is supposed to be exclusively for statistical purposes [42].

3. RESTRICTIONS ON FOREIGN DIRECT INVESTMENTS

I would be going beyond my topic if I were to draft a catalogue of all existing restrictions [43]. But it seems worthwhile to reduce my three-foot-high documentation to a short list of the main types of restraints that I have discovered. These are the most common restrictions: (1) exchange control restrictions, legitimate or misused, for the purpose of controlling foreign investments (e.g., Ireland, Italy, U.K. before 1979) [44]; (2) monetary policy measures prohibiting any acquisition of national securities (e.g., Switzerland in 1978-1979) [45]; (3) restrictions on acquisition of land and buildings (e.g., Finland, Switzerland since 1961) [46].

As far as takeovers and the establishment of branches and subsidiaries are concerned, these requirements are frequently encountered: (4) discretionary authorization--that is, the power to prohibit (e.g., France for non-EEC investments, U.K., Spain, Norway, Portugal) [47]; (5) special discretionary authorization in the field of public takeover bids (e.g., Belgium for non-EEC investments) [48]; (6) prior notification for reasons of industrial policy (e.g., Belgium) [49]; (7) notification for statistical purposes--prior, subsequent, or periodic (e.g., France for EEC investments, Germany) [50]; (9) business permit for setting up a branch (e.g., Germany for non-EEC investments, Spain) [51].

One could also mention a variety of other regulatory mandates:

special permits (industrial, regional, pollution) [52], foreign joint venture laws in Eastern Europe [53], compulsory residence for the manager of a branch [54], residence, work, and foreign merchant permits [55], consultation with professional councils [56], requirements applicable to transfer-of-technology agreements [57], and rules for specific economic sectors such as national defense, transportation, energy, nuclear industry, pharmaceutical industry, agriculture, insurance companies, and banks [58].

That is not all, because restrictions can also be found in corporate law, specifying the nationality of founders [59], shareholders [60], directors [61] or managers [62]. Less significant, of course, are provisions requiring the mention of foreign directors on the letterhead of the company [63] or the compulsory reporting to the company of any shareholding in excess of twenty-five percent [64].

Finally, purely private restrictions in company bylaws should be mentioned as prohibitions against foreign shareholding [65]. For example, the Swiss practice of *titres nominatifs liés* [66] grants the board of directors the discretionary power to refuse new shareholders. Thus, it is extremely difficult to achieve a successful takeover against the wish of the board. In the field of private restrictions, comment could also be added about U.K. situations (or, more exactly, City situations) such as membership in Lloyd's [67] or the membership of the Accepting Houses Committee [68].

4. DEVELOPMENT AND EFFECTIVENESS OF RESTRICTIONS

I do not want to leave you, after such a catalogue, with the misleading impression that European thinking is basically hostile to a liberal or neutral approach to the movement of capital. Some very brief comments on recent developments and on the effectiveness of restrictions may help you to understand where we really stand on the other side of the Atlantic.

A. Developments

The only recent developments that can be considered very significant are the 1979 abolition of exchange control in Great Britain and the 1980 liberalization in France, mainly for EEC investments. In the long run, the principal trend is certainly toward the reduction--in law and in fact--of existing restrictions. As far as EEC countries are concerned, this trend has been stimulated by EEC law on the right of establishment. Often in Member States, the abolition of one or another restriction for EEC investments was extended to all foreign investments.

However, there is also a trend in the other direction, linked to the development of more interventionist industrial and regional policies in several countries. The application of such policies rarely remains completely neutral with regard to equal treatment of foreign investments.

B. Effectiveness

First of all, it should be kept in mind that many authorization or prohibition devices--although very impressive as statutory or regulatory texts--are never or very rarely applied [69].

Second, it should be noted that the effectiveness of statu-

tory authorization or prohibition devices is not altogether evident. Certainly, the private Swiss device of *titres nominatifs liés* has played a protective role for Swiss corporations that is much more efficient than any governmental control of foreign direct investments [70].

Another example of the circumvention of official regulation may be found in France. In November 1980--thanks to the abolition of the authorization procedure for EEC investments--the Italian group Ferruzzi took control of Beghin-Say, the number one French sugar company. One month later, because of extremely heavy pressures from the President, the French government, and French agricultural circles, a "French solution" was found in agreement with Ferruzzi [71]. The Italian group had properly read the Circular of 1980, but apparently it forgot that the agriculture and food sector had become private turf for the French.

Other examples of "national solutions" may be found in the British or the German practice of takeovers [72], which are controlled without the assistance of restrictive regulations.

Finally, with all their complicated regulations, are the European governments better equipped than the British Foreign Office was in 1890 when it simply said "no" to shareholders who were intending to sell a controlling interest in the North-West Africa Company to Leopold II, as King of the Congo [73]? I leave the answer to each of you, and I come to the last topic: restrictions on foreign direct investment in the field of banking.

5. RESTRICTIONS ON FOREIGN INVESTMENT IN BANKS

First, let me point out that up to now neither the EEC nor any individual European country has established a corpus of national and international banking regulations as complicated as that of the U.S. (and I hope it will never happen). Even for a specialist, U.S. rules can be reasonably characterized as a legal nightmare [74]. Before ending with some examples of restrictions in non-EEC countries, I shall consider foreign investments in EEC banks.

A. Within the EEC

The right-of-establishment principles which were discussed earlier with regard to corporations [75] are also applicable to the banking sector of the EEC. However, in a business that has traditionally been protected and closely supervised, liberalization is not so easy. As a matter of fact, right-of-establishment problems in banking are entangled with problems of freedom to render services [76] and problems of capital movements [77]. From the point of view of the EEC Treaty, most of the principal banking operations--such as granting credit, accepting deposits, issuing bonds, buying and selling securities--are not services but are movements of capital. Therefore, they are not yet fully liberated. Moreover, national supervisory systems are usually based on the site of establishment [78].

Although this situation has not prevented achievements such as the merger of the London and Dublin Stock Exchanges, the movement of German banks to Luxembourg, or various examples of cooperation between European banks in the seventies, it can be improved only by means of the coordination procedures established by the EEC Treaty [79].

In the banking field [80] two directives have been adopted. The first one is the "Council directive of 28 June 1978 [81] on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions." The second directive is the "(first) Council directive of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions" [82].

The present situation, resulting from the two directives and their implementation [83], can be summed up in three comments. (1) As regards the right of establishment, there are no longer any significant restrictions on the formation in EEC Member States of branches or subsidiaries of EEC credit institutions [84]. (2) There remain, however, transitional difficulties to be solved concerning the standard "economic needs of the market" and its application [85]. (3) Article 9 of the 1977 Directive deals with branches of credit institutions whose head offices lie outside the Community [86]. On the one hand, Member States may not apply a more favorable treatment than the EEC treatment to such branches; on the other hand, the Community may, through agreements with third countries on the basis of reciprocity, accord to such branches identical treatment throughout the EEC territory.

Presently no agreement of this kind exists, but it may be said that the EEC freedom of establishment and the implementation of banking directives have generally encouraged equal treatment of branches and subsidiaries of EEC and non-EEC credit institutions. This is perfectly illustrated by the U.K. Banking Act of 1979 which made no distinction between EEC and non-EEC foreign banks [87].

As a matter of fact, current legal and practical banking issues primarily concern supervision, and cooperation between supervisory authorities [88], rather than restrictions on foreign investments in banks. The stronger the cooperation grows, the less important will be the need for restrictions.

B. Restrictions in Non-EEC Countries

Restrictions on foreign investment in banks still exist, however, inside the EEC--for non-EEC investors--as well as outside the EEC--for all investors. In this second category, Switzerland and Spain are two examples of countries with special treatment of foreign banks.

The Swiss situation is typical. The multiplication of foreign bank subsidiaries in Switzerland during the sixties led to the introduction, in 1971 of special rules concerning "banks in foreign hands" [89]. This statutory regime controlling foreign banking subsidiaries [90] was built on the basis of two principles: (1) The granting of a bank licence is subject to the traditional condition of reciprocity [91]. (2) Precautions must be taken to prevent the subsidiary from giving the impression, because of its name, that it is a Swiss bank. Rules are also designed to ensure a significant allegiance to Switzerland in matters such as monetary and credit policies, the residence of managers, and representation of the subsidiary [92].

The application of such rules turned out--not surprisingly--to be difficult. There is no clear standard defining a bank in foreign hands (let us think of the example of a Swiss bank with forty-five percent foreign shareholding), or the condition of

reciprocity, which the Federal Banking Commission identifies through a flexible, case-by-case approach [93].

The Spanish banking law, which had been extraordinarily restrictive toward foreign investment, was substantially liberalized by a Royal Decree in 1978 [94] in accordance with the Spanish open-door policy after Franco. The classical standard of reciprocity was chosen, together with a discretionary authorization--based on national economic interest--to be granted by the Council of Ministers itself.

Apparently no European country presently has a provision like the one contained in the Canadian Bank Act of 1967 which, until 1980, required seventy-five percent Canadian control of all federally chartered banks [95]. Furthermore, there is nothing comparable to the provision of the Canadian Bank Act of 1980, restricting the domestic assets of all foreign bank subsidiaries in the aggregate to eight percent of total domestic assets of all banks in Canada [96].

MR. HAWES: Thank you, André. Assume that a client comes to you wanting to make a direct investment--not a takeover bid, but just to establish a subsidiary or to buy property. Take Belgium, if you wish, and let us say it is an American company or investor. Would your approach be to say, "It is quite possible," or "It is going to be very, very difficult"? Where does it fit in that spectrum?

MR. BRUYNEEL: No doubt I would answer, "It will be easy, as far as Belgium is concerned."

MR. HAWES: If you were a French lawyer or a German lawyer?

MR. BRUYNEEL: I would say, "Be very, very, very careful."

NOTES

- [1] Sometimes there are very restrictive legal provisions that are never applied (e.g., article 13 of the U.K. 1975 Industry Act), or there may be restrictive administrative practices developed with or without a basis in statutory law.
- [2] See particularly, *International Direct Investment* (policies, procedures, and practices in OECD member countries), OECD publications, 1979.
- [3] E.g., as far as EEC antitrust law is concerned, substantial difficulties can arise with some types of joint ventures. See Lukoff, *Joint Ventures, EEC Theory and Developing Case Law*, 2 *The International Contract* 37-44 (1981). In connection with Article 86 of the Treaty, see the Continental Can case: Judgment of 21 February 1973, [1973] ECR 215.
- [4] See, e.g., General principle nr. 13 of the City Code on Take-overs and Mergers (revised edition February 1981). An excellent comparative study on the sale of controlling interest is Lempereur, *Cessions de majorité et protection des actionnaires minoritaires en droit comparé*, 1978 *Revue Pratique des Sociétés* (Brussels) 91-187.

- [5] E.g., such involvement is very important in the Netherlands with respect to acquisitions (see Act on Workers' Councils, as amended September 1, 1979) or public takeover bids and mergers (see Fusiegedragsregelscode 1975, which is a resolution of the Social and Economic Council).
- [6] The trend will probably and unfortunately be very different in the field of trade policies, at least for several sensitive sectors.
- [7] For a description of the general trends, see the OECD documents published from time to time by the Committee on International Investment and Multinational Enterprises.
- [8] The most recent edition was published in 1978 by OECD publications. The original 1961 Code was adopted after promulgation of the OECD Code of Liberalization of Current Invisible Transactions. As regards current payments, compare the IMF rules and the 1955 European Monetary Agreement.
- [9] *International Direct Investment*, supra note 2. This document shows, *inter alia*, that national authorities do not always fully respond to questions; that every government considers its practice to be liberal; that exchange control is, as far as foreign investment is concerned, a basically ambiguous matter; and that national statistics are extremely difficult to compare—for example, the number of refused authorizations or number of applications withdrawn.
- [10] *International Investment and Multinational Enterprises*, OECD publications, ed. 1979. (1976 Declaration and Council's Decisions.)
- [11] For a well-known application of this non-binding set of rules, see the Badger case (1977): Blanpain, *The Badger Case and the OECD Guidelines for Multinational Enterprises* (Kluwer, 1977).
- [12] *National Treatment for Foreign-Controlled Enterprises*, OECD publications, 1978; *International Investment and Multinational Enterprises*, supra note 10.
- [13] EEC Treaty, title I.
- [14] The freedom of movement for workers (articles 48 and 51) and the freedom to provide services (articles 59 to 66) within the Community do not involve, at least directly, restrictions on foreign investment. For a detailed description of EEC law on the four freedoms, see Mégret and others, *Le droit de la Communauté économique européenne*, volume 3 (Brussels, 1971).
- [15] Article 52 refers to the article 58 meaning of companies or firms and to chapter 4 provisions on the free movement of capital. EEC Treaty. The problem of dominion is therefore solved without reference to a theory of control.
- [16] See article 54, para. 3(e)(f) and (h), EEC Treaty.
- [17] Article 54, para. 3(g), pertaining to companies, and article 57, para. 2 concerning the financial sector, EEC Treaty.

- [18] Reyners case: Judgment of 21 June 1974, case 21/74 [1974] ECR 631; Van Binsbergen case: Judgment of 3 December 1974, case 33/74 [1974] ECR 1299; and several subsequent cases aimed at clarifying points of detail.
- [19] The application of these principles concerning the right of establishment was in no respect modified or delayed by the Accession Treaty of 1972 (Denmark, Ireland, and U.K.) or by the Accession Treaty of 1979 (Greece).
- [20] On the fundamental question of the "direct effect" of EEC Treaty provisions, see Lecourt, *L'Europe des juges* 248-263 (Brussels, 1979). Concerning the less direct effect of EEC directives, see Pescatore, *L'effet des directives communautaires: une tentative de démythification*, *chron. XXV* (Dalloz Sirey, 1980) (only the lack of implementation, or inadequate implementation, of a directive may be brought as a cause of action, and only against a Member State); see also, Timmermans, *Directives: Their Effect Within the National Legal Systems*, 1979 *Common Market Law Review* 533-555.
- [21] Commercial Code, book I, title V, article 108, §2; see *Report to the King*, Pasinomie 1967, 1313-1314, pertaining to the traditionally liberal attitude of the Belgian government and to the OECD Code of 1961.
- [22] In addition, the Commission was not pleased by the standard "company under foreign control"--even as elucidated by the "general programmes" of 18 December 1961: "lien effectif et continu avec l'économie d'un Etat membre".
- [23] A declaration that article 108, §2 would never be applied to EEC nationals, except after the procedure established by article 73 of the EEC Treaty; the claim that enterprises in a small country are particularly exposed to foreign takeovers; and other arguments. See the legislative history of the Act of 1972, *infra* note 25.
- [24] EEC Treaty, article 169.
- [25] Act of 11 July 1972, Pasinomie 1972, 418-426, including the legislative history and a description of similar restrictions in other EEC countries. The new text of article 108, §2 is worded as follows:

The same authorization shall be required for any public offer to exchange or to purchase Belgian securities, realized by or for the account of:

 1. physical persons other than nationals of a member state of the European Economic Community;
 2. corporate bodies, public or private, that are not formed according to the law of one of these states;
 3. corporate bodies, public or private, that are formed according to the law of one of these states but that do not have their registered office, administration office or principal place of business within the Community.
- [26] An interesting case happened in the insurance field. The Minister of Finance rejected a U.K. public takeover bid for a Belgian insurance company because the bidder, unlike another bidder, did not undertake to maintain full employment in the Belgian company.

- [27] Public takeover bids are under the supervision of the Banking Commission, which acts in order to protect investors, not in order to evaluate the takeover. On that supervision, see Bruyneel, *The Belgian Commission Bancaire: Functions and Methods*, 1980 DPCI 351-384 (up-to-date revision of an article published in the *Journal of Comparative Corporate Law and Securities Regulation*, 1 J. Comp. Corp. L. & Sec. Reg. 187 (1978)).
- [28] The Belgian government was also compelled to propose to Parliament a modification of article 36 of the Act of 30 December 1970 on economic expansion, which deals with incentives, grants, employment, planning, and measures of industrial policy. Article 36 requires prior notification to the Minister of Economic Affairs, the Minister of Finance, and the Minister of Regional Economic Affairs in case of sale to foreigners—or Belgian companies under direct or indirect foreign control—of more than one third of the capital of a Belgian enterprise with an equity of at least BF 100 million. The solution finally adopted (Act of 17 August 1973) was not to lift the restriction for EEC investors as with article 108; but instead, the prior notification system was extended to all sales, even to Belgian nationals.
- [29] Chapter 2 of title II of the EEC Treaty.
- [30] Article 67: principle; articles 68 and 69: program, procedure, and directives; articles 70 and 72: coordination of the exchange policies towards third countries; article 71: standstill clause; article 70, para. 2 and article 73: safeguard clauses. See also article 221: national treatment respecting participation in the capital of companies or firms.
- The consistency and combination of the two sets of rules (67 to 73; 104 to 109) is a difficult matter: see Mégret et al., *supra* note 14, volume 3, at 173-259; Heenen, *La libre circulation des capitaux*, in *Novelles, Droit des Communautés européennes* 755-772 (Brussels, 1969).
- On escape clauses, see Manin, *A propos des clauses de sauvegarde*, 1970 Rev. trim. dr. eur. 1-42; Seidel, *Escape Clauses in European Community Law*, 1978 *Common Market Law Review* 283-308 (with special reference to capital movements).
- [31] Mégret et al., *supra* note 14, volume 3, at 177. The European Court of Justice will soon deal with this problem.
- [32] First directive of 11 May 1960 (JOCE nr. 43 of 12 July 1960); second directive of 18 December 1962 (JOCE nr. 9 of 22 January 1963).
- [33] Compare list B, where transactions such as portfolio investments in quoted securities are unconditionally made free on the basis of general exchange authorizations; list C, where transactions are conditionally made free—i.e., only in Member States (Germany, Belgium, Luxembourg) where such freedom already existed in 1960; and list D, where transactions that might involve speculative capital movements are not necessarily freed by the Member States. The four lists were based on the corresponding liberalization work of the OECD Code of 1961.
- [34] See also article 49 ff, 1979 Accession Treaty with Greece.

[350]

- [35] For example, it must be determined whether a transaction is to be found on list A or on another list. The same odd practice exists in systems of two-tier exchange markets--as in Belgium.
- [36] See Mégret *et al.*, *supra* note 14, volume 3, at 210-215. The EEC's rather minimal achievement in the field of capital movements can be explained by various factors: treaty objectives are less precise than for the other freedoms; there is a lack of clarity and consistency between articles 67 to 73 and articles 104 to 109; political will was weak and there was no precise conception of an ideal European capital market. This situation led to the "Rapport Segré": *Le développement d'un marché européen des capitaux*, EEC publication nr. 8.181 (1966) which is at the origin of EEC efforts in other directions: *inter alia*, coordination in the banking field, securities markets, and economic and monetary union. See Mégret *et al.*, *supra* note 14, volume 6 at 29-134.
- [37] Decree nr. 67-78 of 27 January 1967 and subsequent decrees and circulars issued according to Act nr. 66-1008 of 28 December 1966.
- [38] Decree nr. 68-1021 of 24 November 1968 issued according to Act No. 66-1008, *id.* EEC decisions of 23 July 1968 (JOCE nr. L 178 of 25 July 1968) and of 4 December 1968 (JOCE nr. L 295 of 7 December 1968). The validity of the application of articles 108 and 109 of the EEC Treaty has been contested, but not successfully. See Judgment of 2 February 1976, Tribunal de grande instance de Lille, Dalloz Sirey [1979] jur. 241-245, note Minet.
- [39] Appeal nr. 66/69 filed, but never heard, at the European Court of Justice. See Mégret *et al.*, *supra* note 14, volume 3 at 218-228; see also the EEC answer to a parliamentary question in 1969: 1970 Rev. trim. dr. eur. 183-184 (which refers to articles 52-58 (and directives), article 221, and article 67 (and 1960 directives)).
- [40] Decree nr. 71-144 of 22 February 1971 replacing article 4 of Decree nr. 68-1021, *supra* note 38; see also Decree nr. 74-721 of 26 July 1974, introducing a new article 4 bis in Decree nr. 68-1021.
- [41] Journal officiel of 5 August 1980. Article 4 bis of Decree nr. 68-1021 is now worded as follows:

1° Les investissements directs effectués à l'intérieur de la Communauté économique européenne qui répondent aux deux conditions suivantes *sont libres*

with three exceptions:

Les investissements effectués dans des activités participant en France, même à titre occasionnel, à l'exercice de l'autorité publique; les investissements mettant en cause l'ordre public ou la santé publique ou la sécurité publique, ainsi que ceux réalisés dans des activités de production ou de commerce d'armes, de munitions et de matériels de guerre; les opérations ayant pour effet de faire échec à l'application des lois et réglementations françaises.

- [42] On the basis of the Decree of 4 August 1980, there has been published a very comprehensive new *Circular of 6 August 1980*, Journal officiel of 9 August 1980. The Circular is interesting in many respects: it gives a detailed and extensive definition of control; it excludes EEC companies under foreign control; and it contains other measures liberalizing small-sized foreign direct investments in France.
- [43] Attempts to draft such a catalogue were made in the two OECD documents referred to in notes 9 and 12 *supra*. Other interesting sources include a booklet published by Abecor in 1976: *Investissements étrangers en Europe*; the *Tax Management* series; and booklets published for each country (*Investment in ...*) by firms like Peat, Marwick, Mitchell & Co.
- Such introductory sources must be complemented by an examination of the legal texts and also by meetings designed to provide a satisfactory understanding of administrative practices. I had such contacts in several countries but, due to lack of time, I cannot comment on the various interesting discoveries I made and the conclusions that can be drawn.
- [44] Also problems of repatriation of income or investment. The misuse of exchange control is particularly clear when the control was established in order to avoid excessive outflow of capital.
- [45] The abolition of the Federal Council Decree on investment by non-residents in Swiss securities became effective on 24 January 1979.
- [46] "Lex Furgler": Decree of the Federal Assembly of 23 March 1961; Federal Council Decree of 21 December 1973. The system, which is presently under review, has apparently never been used to prevent a subsidiary or a branch from buying land and buildings necessary for its industrial activity.
- [47] France: see section 2B(ii) *supra* at 144 and notes 37 to 42. U.K.: see article 13 of the 1975 Industry Act concerning change of control contrary to the interests of the U.K. or any substantial part thereof. Spain: see Decrees of 31 October 1974 and Royal Decree of 26 November 1976, pertaining to foreign direct investment in excess of 50% of the capital of a Spanish company. Norway: see *International Direct Investment*, *supra* note 2. Portugal: see *Foreign Investment Code: Decree-Act nr. 348/77*.
- [48] Article 108, paragraph 2 of the Act on stock exchanges. See section 2B(i) *supra* at 143 and notes 25 to 27.
- [49] Article 36 of the Act of 30 December 1970: see *supra* note 28.
- [50] France: see section 2B(ii) *supra* at 144 and notes 37 to 42. Germany: see *Aussenwirtschaftsgesetz (AWG)*, §1.
- [51] Germany: see *Gewerbeordnung (GewO)*, §12. The permit may be refused for lack of reciprocity. Spain: authorization of the Ministry of Commerce: see Decree of 31 October 1974 articles 13-14.
- [52] *E.g.*, in the Netherlands.

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- [53] *E.g.*, in Yugoslavia, see the Act of 30 March 1978 on foreign investments (comprehensive commentary in 1980 DPCI 385-415). See in general, Florescu, *Les sociétés mixtes dans les pays socialistes, nouvelle forme de coopération économique internationale*, 1978 DPCI 243-267.
- [54] Frequently required by tax regulations.
- [55] In all countries, except for EEC nationals in Member States. A particularly restrictive policy in this respect has been followed by Switzerland for several years; see Revaclier, *Obstacles à l'implantation d'entreprises étrangères en Suisse: les dispositions limitant le nombre des étrangers qui exercent une activité lucrative*, 1976 DPCI 89-99.
- [56] *E.g.*, in Austria.
- [57] *E.g.*, in Spain.
- [58] As far as banks are concerned, see section 5 *infra* at 147.
- [59] *E.g.*, in Denmark at least two founders must be Danish (Company Act, article 11 for A/S), but this requirement has been lifted for EEC nationals.
- [60] *E.g.*, in Finland the bylaws may limit foreign shareholdings to 20% of the capital: *International Direct Investment*, *supra* note 2, at 23.
- [61] *E.g.*, in Denmark at least half of the directors must be Danish (Company Act, article 52 for A/S), but this requirement has been lifted for EEC nationals. In Switzerland a majority of the directors of an S.A. must be Swiss nationals residing in Switzerland, with a possibility of exemption for holding companies (Code des obligations, art. 711, para.2).
- [62] *E.g.*, in Denmark (Company Act, article 52 for A/S), but this requirement has been lifted for EEC nationals.
- [63] U.K. Company Act of 1948, article 201. This requirement has been lifted for EEC nationals.
- [64] German Aktiengesetz, article 20. The company is in turn obliged to publish any information it receives on such shareholding in excess of 25 percent.
- [65] See section 2B(i) *supra* at 143 for the position of EEC nationals.
- [66] Stimulated by the Federal Council as far as banks are concerned.
- [67] However, Lloyd's has had foreign "names" since 1968.
- [68] Anthony Gibbs, after becoming a subsidiary of the Hong Kong and Shanghai Bank, withdrew from the Committee.

- [69] E.g., article 13 of the U.K. 1975 Industry Act has never been applied; also it apparently was never communicated to the OECD. See Weinberg, On Take-over and Mergers (nr. 1505, 1979 ed.). In Belgium, article 108, para. 2 of the Act on stock exchanges, *supra* note 48, has been applied only extremely rarely. See also the statistical data published in *International Direct Investment*, *supra* note 2. It should be noted, however, that the length of the authorization procedure has sometimes in fact resulted in the prevention of an investment.
- [70] Compare, for example, the rather minor importance of branches and subsidiaries of multinational enterprises in Switzerland with the very high figures for Belgium. It is interesting to note that the investments of Belgian Multinational Enterprises abroad are also of similar great importance.
- [71] L'Express (Paris), 6 December 1980; Le Soir (Brussels), 4 December 1980.
- [72] In Germany, there is even a gentleman's agreement among the banks, several business and industry organizations, and the federal government, which provides that no sale of the control of an enterprise will be made to foreigners without consultation.
- [73] Barbara Emerson, Leopold II: The Kingdom and the Empire, chapter XXI (London, 1979).
- [74] See Yellon and Welsh, *Counseling Foreign Banks on United States Bank Acquisitions: The Foreign Banker Meets His U.S. Lawyers*, 2 J. Comp. Corp. L. & Sec. Reg. 303-333 (1979).
- [75] See section 2B(i) *supra* at 143.
- [76] EEC Treaty, articles 59 to 66.
- [77] See section 2B(ii) *supra* at 144.
- [78] On these problems, see the very interesting paper presented by Mr. Troberg, *Freedom of Establishment, Freedom to Supply Services: The Field of Financial Institutions and Their Operation*, at the 1980 Brussels Seminar of the International Faculty for Corporate and Capital Markets Law [available from the editors of this journal]. See also, Judgment of 26 November 1975 (Coenen), [1975] ECR 1547 (as an exception to the general rule, a location and a permanent address may be required for services of a special nature that need supervision which can be effected only on the spot).
- [79] See, in general, articles 100 and 101, and especially in reference to banks, articles 57, para. 2 and 61, para. 2; see also articles 54, para. 2 and para. 3, and 63, para. 2 and para. 3.
- [80] The EEC directives or proposals or Codes of conduct in the area of securities markets and regulations will not be treated here, for they are more closely related to problems of foreign portfolio investment and foreign issues than to problems of foreign direct investment. The same is true for directives, and proposals for directives, in the corporate and accounting fields.

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- [81] OJEC, nr. L 194 of 16 July 1973. See, as regards freedom to provide banking services, the interesting Judgment of 24 October 1978 (*Société Générale Alsacienne de Banque*), [1978] ECR 1971.
- [82] OJEC, nr. L 322 of 17 December 1977. An excellent and comprehensive comment on the directive of 1977 has been published by Le Brun, *Une première étape vers l'harmonisation européenne des réglementations bancaires*, 1979 *Revue de la Banque* (Brussels) 25-57. See also the paper presented by Mr. Clarotti, *The Harmonization of Legislation Relating to Credit Institutions*, at the 1980 Brussels Seminar of the International Faculty for Corporate and Capital Markets Law [available from the editors of this journal].
- [83] The time limit for implementation of the 1977 directive was December 1979; but several Member States have not yet complied.
- [84] For an interesting general view on the present situation, see IBRO, *The Regulation of Banks in the Member States of the EEC* (1978).
- [85] See article 3 of the 1977 directive, and Le Brun, *supra* note 82, nr. 2.2.1.4.
- [86] See also Le Brun, *supra* note 82, nr. 2.2.3, and, as regards branches of EEC credit institutions, nr. 2.2.2.2. With respect to the subsidiaries of non-EEC credit institutions, an issue not covered by article 9, see Le Brun, *L'harmonisation des législations bancaires et les autorités nationales de contrôle*, in *The Development of Financial Institutions in Europe, 1956-1976*, at 350 ff. (Sijthoff-Leiden, 1977).
- [87] Banking Act 1979, chapter 37, HMSO 1979; see also Watson, *The U.K. Banking Act 1979*, 1980 DPCI 71-81; and Revell, *The Regulation on Banks and the New English Banking Law*, 1981 *Revue de la Banque* (Brussels) 5-28.
- [88] And even competition among authorities. See Giddy and Allen, *International Competition in Bank Regulation*, 1979 *Banca Nazionale des Lavoro Quarterly Review* 311-326; compare Revell, *The Complementary Nature of Competition and Regulation in the Financial Sector*, 1980 *Revue de la Banque* (Brussels) 9-32.
- [89] Federal Act on Banks and Savings Banks, 8 November 1934, revised on 11 March 1971. By an "urgent" vote, new rules on foreign banks were first introduced by a Federal Decree of 21 March 1969. A new revision of the Act is presently in preparation.
- [90] As regards branches, see Decree of the Federal Banking Commission of 14 September 1973.
- [91] This requirement can also be found in many other European countries, including EEC countries. For example, Italy demands reciprocity for non-EEC subsidiaries and The Netherlands, for non-EEC branches. See items 25 and 27 of the summary table that forms the annex to IBRO, *supra* note 84, and its corresponding chapters. Clearly, the content and the application of the requirement of reciprocity may be extremely different from one country to another. Such differences also result from the degree of independence of the authority in charge

of granting licences; this may be an independent commission as in Switzerland or Belgium, the central bank, the Minister of Finance, or the government itself.

- [92] Hirsch, *La surveillance des banques en Suisse*, in *Festschrift für Johannes Bärmann* at 467 (München, 1975):

La raison sociale de ces banques ne doit pas permettre de penser qu'il s'agit de banques suisses. D'autre part, la banque "en maine étrangères" doit donner à la Banque Nationale l'assurance qu'elle adhèrera à la politique suisse en matière monétaire et dans le domaine du crédit; elle est tenue de donner certains renseignements à la Banque Nationale à cet effet. En outre, la majorité des membres de la direction doit être domiciliée en Suisse; ceux qui sont domiciliés à l'étranger ne peuvent pas signer individuellement ni collectivement entre eux. Toutes ces règles ne soulèvent pas de difficultés.

- [93] See Hirsch, *supra* note 92, at 467-468; Hirsch, *La Commission fédérale des banques en 1974*, *La société anonyme suisse*, at 51-53; Chapuis, *Le statut des banques étrangères en Suisse*, 1976 DPCI 119-138; Müller, *La surveillance des banques en Suisse*, 1980 *Revue de la Banque* (Brussels) 61-76.
- [94] Real Decreto nr. 1388/78 of June 1978 on foreign banks in Spain; see Fernandez Rozas, *La nouvelle réglementation de la banque étrangère en Espagne*, 1978 DPCI 363-381. The first draft of the decree was still significantly restrictive.
- [95] See Engle, *International Investment*, 9 Harv. Int'l L.J. 305-317 (1968).
- [96] Bank Act 1980, chapter 40; see Robinson, Hoffstein and Thompson, *Foreign Banks in Canada - The Door Opens*, 2 *The International Contract* 11-20 (1981).